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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966.

**No. 1132**

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK-AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

*Petitioner,*

*vs.*

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF.

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## REPLY BRIEF.

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### I. THE CHALLENGED RULES CONSTITUTED A CONCERTED REFUSAL TO DEAL.

(Reply to pp. 19-21 of Brief in Opposition.)

Respondent presents a twofold argument in support of the decision below: first, that under Section 1 of the Sherman Act the legality of the challenged membership rules depends upon application of the "rule of reason"; and second, that under *Board of Trade*[1] the jury should have been instructed to take into account petitioner's alleged unfair trade practices in determining the "reasonableness"

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1. *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231.

of the membership rule restraint (Br. 19-21). Respondent no longer suggests that its unfair trade practices defense "if established" would "bar FNTDN from both recovery of damages and injunctive relief" (Pet. App. B, p. 28). It now disclaims responsibility for that decision by the court below (Br. 21-2).

The answer to respondent's rule of reason argument is that this is a concerted refusal to deal case. We know of no decision which holds that there can be a "reasonable" concerted refusal to deal. As this Court emphasized in *Klors* v. *Broadway-Hale Stores,* 359 U. S. 207, 212: "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances. . . .". Even respondent concedes that it "cannot escape liability [for a *per se* violation] by pointing to petitioner's misconduct" (Br. 21).

The concerted refusal to deal can be quickly demonstrated. FTD is by definition an association of retail florists or independent businesses. The form of association is no different than in *Associated Press.*[2] Each member upon admission to membership "surrender[s] himself completely to the control of the association" (*Anderson* v. *Shipowners Asso.,* 272 U. S. 359, 362) and agrees to abide by FTD's by-laws and all rules adopted by the FTD board. Violation of any rule is ground for expulsion (Ex. R. 3). "The fact that the consensus underlying the collective action was arrived at when the members bound themselves to comply with [FTD's rules] upon being admitted to membership rather than when [the rules were adopted] does not diminish the collective nature of the action. A blanket subscription to possible future restraints does not excuse the restraints when they occur" (*Silver* v. *New York Stock Exchange,* 373 U. S. 341, 348, n. 5).

2. *Associated Press* v. *United States,* 326 U. S. 1, 3-4.

As the court below concedes (Pet. App. B, p. 27) following announcement of the rules virtually all of petitioner's subscribers either immediately resigned or let their franchises lapse at the first renewal date. Petitioner experienced a 97% rejection rate after announcement of the challenged rules (Ex. R. 70). Within a matter of months its organization was riddled. It is difficult to imagine more conclusive evidence of a concerted refusal to deal.

Typical of the resignation letters were the following:

> "In accordance with the FTD Newsletter of July 17, 1961, we ask that you remove our shop name from the Roster of Members of America's Phone-Order Florists, Inc. Also do not renew the telephone 'yellow page' ads carried in the Lafayette directory for the coming year" (McKinney's Flowers, July 17, 1961, Ex. R. 19).
>
> " In accordance with a directive received today from FTD we are notifying you as attorneys for Jane's Flowers . . . to terminate her membership with you, and that the above names be removed from your roster, the same effective immediately" (Jane's Flowers, July 18, 1961, Ex. R. 16).
>
> "Please take my name off the membership list at once. As you probably know FTD has passed a rule against this and I don't want to jeopardize my FTD membership. Please don't delay" (Sorenson's Floral Shop, August 2, 1961, Ex. R. 17).
>
> "In the face of what FTD office has ruled as being put out of membership, I don't see how anyone can continue in your organization. So I am hereby submitting my resignation from F.N.T.D.N. Sorry it had to end up that way . . ." (Arthur Crabb Flowers, September 14, 1961, Ex. R. 18).[3]

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3. Respondent notes that no FTD member was ever disciplined under the rules for joining petitioner or using its services (Br. 23, n. 24). There was no need for such disciplinary action because of the immediate voluntary compliance with the rules. Nor was it necessary to show that formal sanctions were imposed. See *United States* v. *National Asso. R.E.B.*, 339 U. S. 485, 489; *Eastern States Retail Lumber Asso.* v. *United States*, 234 U. S. 600, 608-9.

In *Associated Press* this Court declared, "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in any common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the group compete" and "arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose" (326 U. S., at pp. 15, 19). Here the rank and file FTD membership complained that petitioner's directory and yellow page advertising made FNTDN's subscribers the target for additional wire order business (R. 192-3, 265-6; Ex. R. 30-4). It was this competition for additional business which FTD "stifled" for the sake of preserving harmony among the members of the association. It was accomplished through a "membership device" which forbade use of petitioner's services.

The liability issue in this case could have been decided by summary judgment as in *Associated Press* had the challenged FTD rules flatly prohibited use of petitioner's services. However, the rules could not be so phrased because this would have been an obvious violation of the consent decree.[4] It therefore was necessary to establish that the rules in fact were aimed at petitioner and were intended to

4. Respondent's argument (Br. 11-13) that the rules were "twice cleared" by the antitrust division of the Department of Justice is answered fully in the government's *amicus* brief filed in the court below and transmitted with the petition (see Pet. pp. 9-10, n. 8). It should be noted that FTD's "cover" letter to Justice made no mention of petitioner and did not disclose, as the evidence showed, that the rules were "aimed at" petitioner (R. 227-8; Ex. R. 49, 50), that they were "intended to block the network" (R. 98-102), and that they were "expressly intended to stop FTD members from joining the organization that is now suing FTD" (R. 353-6). When petitioner complained that the rules were intended to prevent use of its directory and yellow page services, Justice wrote FTD, "to the extent that this has been and continues to be your reading of these rules, the rules in practice do not, in our opinion, comply with [the consent decree]" (Ex. R. 85).

prevent FTD members from using petitioner's directory and yellow page services and that the membership so understood them. The evidence on this score was so conclusive that respondent's counsel conceded the fact at the trial and again in the court below. He said, "We make no bones about it" (R. 180). Having established the purpose and meaning of the rules, it was as if they had in actual text read:

> "No FTD member shall permit the publication of his shop name in the FNTDN directory;

and

> "No FTD member shall advertise or hold out to the public in any manner that he is the exclusive representative of FNTDN or permit his shop name to appear in FNTDN's yellow page advertisements."

The adoption of such trade association membership rules finds no sanction in this Court's *Board of Trade* decision. This is not a case of internal regulation designed to promote competition;[5] the rules were externally directed and intended to prevent use of petitioner's services.[6] The group boycott thereby effected cannot be justified by a claim of good intention, whether expressed in terms of "self-protection" (Pet. App. B, p. 28) or "a defensive response to

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5. See discussions of *Board of Trade* in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 401, and *United States* v. *Socony-Vacuum*, 310 U. S. 150, 217.

6. Neither *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, nor *Union Leader Corp.* v. *Newspapers of New England, Inc.* (1st Cir.), 284 F. 2d 582, suggests that a plaintiff's unlawful trade practice is a relevant consideration in a concerted refusal to deal case under Section 1 of the Sherman Act. These cases were concerned with individual rather than concerted conduct and as this Court declared, "Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1 [citations] different criteria have long applied to qualify the rights of an individual seller" (345 U. S. 624). In the present case respondent's tendered instructions concerning petitioner's alleged unfair practices were offered to justify as reasonable under Section 1 the concerted refusal to deal accomplished through the membership rule restraint.

petitioner's aggressions" (Br. 20). "Nor can [the antitrust laws] be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results." *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49.

Since the evidence established a concerted refusal to deal, the conflict with *Kiefer-Stewart* (340 U. S. 211) cannot be avoided by saying this is a non *per se* case. But even if the rule of reason had been applicable, the jury was here instructed that the rules would be unlawful only if they "were adopted and published with the *specific* intent of destroying plaintiff's business" (R. 467).[7] Respondent has never contended that the evidence was insufficient to support a verdict for petitioner under this instruction. The decisions of this Court certainly do not suggest that "self-protection" or a "defensive response" can justify as reasonable the intended destruction of a competitor. There is no place for such economic vigilantism under the antitrust laws.

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7. While respondent now criticizes this instruction in full text as contradictory and abstract (Br. 16), the fact remains that the instruction was drafted and tendered by respondent's counsel and given over petitioner's objection (App. 7A attached to petitioner's answer brief below).

Respondent similarly criticizes the District Court for reading to the jury from petitioner's complaint but once again respondent made no objection to this procedure which was followed in lieu of giving a special instruction on the issues made by the pleadings (*Ibid.,* pp. 7A-9A).

## II. THE OPINION BELOW HOLDS THAT UNCLEAN HANDS IS A DEFENSE.

(Reply to pp. 21-24 of Brief in Opposition.)

Despite the clear and unambiguous language in the opinion, respondent argues that the court below did not hold that the defense of "unclean hands" if established would bar petitioner from recovery. Respondent asserts that the court merely held that respondent's refused instructions should have been given and that none of these instructions mentioned "unclean hands" as a defense (Br. 21-4).

The difficulty with this argument is that the opinion of the Court of Appeals is not so limited. The opinion states, "The core of FTD's *defense*" is that "FNTDN's purpose and conduct [the alleged boycott and misleading advertising] *preclude* it from recovery on the damage claim and bar it from equitable relief under the *'clean hands' doctrine.* Such defense, if established, would so *bar* FNTDN from both recovery of damages and injunctive relief" (Pet. App. B, p. 28).

The court then sought to distinguish *Kiefer-Stewart* and "similar decisions" on the ground that the "*'unclean hands' defense here asserted* does not relate to a transaction or subject matter other than the one in suit" (Pet. App. B, p. 29). The court also referred to its earlier decision in *Crest Auto Supplies* (360 F. 2d 896, 900), as exemplifying "an application of the *'clean hands'* doctrine which is pertinent here" (Pet. App. B, p. 29).

Equally disingenuous is FTD's disclaimer of responsibility for the decision below (Br. 21-2). Respondent unequivocally argued that "illegal methods" such as "boycott" and "'fraudulent and deceitful' palming-off" constituted a defense to this action.[8] Respondent declared

8. Respondent's initial brief below, pp. 23-4.

that upon proof of such illegal methods "[i]n this case it therefore follows that plaintiff's illegal conduct '*precludes recovery*' (*Ero Mfg.*, 360 F. 2d 900)."[9]

Respondent was also responsible for the purported distinction of *Kiefer-Stewart*. FTD advised the court below, "In sum, both plaintiff's misconduct and defendant's defensive rules were concerned with the 'same transactions'—the distribution and processing of inter-city flowers-by-wire orders by FTD members via the FTD clearinghouse. As this Court held in *Ero Mfg. Co.* (360 F. 2d 896), therefore, *Kiefer-Stewart* (340 U. S. 211) has no application here.".[10]

Respondent now abandons the legal argument which caused error in the decision of the Court of Appeals. While the respondent may attempt to support the decision on alternative grounds, we submit that it is precluded from suggesting that the decision stands for some proposition other than the one advanced in its own brief and adopted by the court below.

## III. RESPONDENT'S FACT STATEMENT DISTORTS THE RECORD.

(Reply to pp. 1-19 of Brief in Opposition).

Respondent devotes 19 pages of its brief in opposition to what is essentially a reargument of fact contentions which the jury by its verdict saw fit to reject. We appreciate that the merits of petitioner's practices are not before the Court on this petition. However, respondent's statement gives such a distorted picture of the evidence that some comment appears in order.

*The Alleged Boycott.* There was not a scintilla of evidence that subscribers of petitioner were boycotting other FTD florists in the exchange of intercity floral orders.

9. *Ibid.*, p. 24.

10. *Ibid.*, p. 26.

If such a boycott were being practiced this fact could have been conclusively established by FTD's own clearinghouse records since all orders exchanged between subscribers of petitioner had to be reported to and cleared through the FTD clearinghouse (Ex. R. 35-6).[11] FTD's general manager Bodette admitted on cross-examination that he had no evidence of a boycott by petitioner's subscribers of other FTD members but that the clearinghouse records, if anything, indicated that just the converse was true (R. 224-5; Ex. R. 48).

Petitioner's president O'Brien testified that he encouraged FNTDN subscribers to use its directory but categorically denied that such use was in any way required or that FNTDN had sought to enforce a mutual exchange of intercity orders (R. 178-9). He explained that the directory was one of the services provided by the petitioner; that it listed only leading florists and was a more reliable directory than any other on the market (R. 178). O'Brien further testified that he told subscribers they were free to exchange orders with whomever they pleased (R. 181-2). O'Brien's testimony was fully corroborated by florists who had used petitioner's services (R. 142).

The evidence fairly showed that petitioner was doing no more and no less than selling a service which it represented to be superior to anything on the market.

*The Alleged Misleading Advertising.* Petitioner's yellow page advertisements were introduced in evidence and, for

11. The FTD mandatory clearinghouse rule provided, "All orders received by any Active Member from any other Active Member . . . shall be reported to and cleared through the Clearing House of this Association" (Ex. R. 7). This rule required FTD members who were dual members in other wire organizations, including petitioner's, to use the FTD clearinghouse when exchanging wire orders with other FTD members (Ex. R. 35-6). Teleflora and Florafax had few dual members (Br. 4) and therefore could afford to establish separate clearing facilities. Such growth as they experienced occurred during the pendency of this action (R. 116-8; Br. 4).

the Court's convenience, are reproduced as an appendix to this reply. These advertisements can be searched in vain for any reference to FTD. They do not say or imply that petitioner's representative is the only florist offering a flowers-by-wire service in the particular city; nor do they say or imply that petitioner's representative is the preferred FTD florist in the city. They merely state that the named florist is the exclusive representative of *petitioner* (R. 420-1).

As to the claimed similarity between half of petitioner's compound name and FTD's name, it hardly requires mention that FTD has no proprietary interest in the words "florists" or "delivery", and that both words were reasonably descriptive of petitioner's organization. Moreover, petitioner's name is a registered service mark.[12] Had respondent really believed that the two names were confusingly similar it undoubtedly would have petitioned to cancel petitioner's mark. This was never done, presumably on advice of legal counsel. In answer to Bodette's inquiry whether there was any merit to such a claim, FTD's counsel wrote that he could find no element of affirmative misrepresentation in petitioner's name and advertisements and "I am unable to see any basis upon which [FTD florists] would be entitled to relief" (Ex. R. 35-6).

12. Petitioner's mark was registered on January 12, 1960 (No. 691088) under the provisions of Title 15 U. S. C. § 1053, *et seq.*

## Conclusion.

For the reasons stated in the petition and this reply brief, petitioner prays that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

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# AMERICA'S PHONE-ORDER Fflorists

To send flowers anywhere call
FLORISTS' NATIONWIDE
TELEPHONE DELIVERY
NETWORK
(No Charge Account Needed)
Just ORDER-BY-PHONE —
PAY-BY-MAIL! Deliveries -
Everywhere - Everyday - "Phonaflower"

"TO ORDER CALL"

Exclusive Representative
Your Name
Address . . . . . Phone No. . .

Postmark
FILED
MAY 16 1963
O'CLOCK
ROBERT A. WAGNER
FOR IDENTIFICATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Plaintiff's Exhibit No. 5

APPENDIX.

# FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK

To send flowers anywhere call
AMERICA'S PHONE-
ORDER FLORISTS
(No Charge Account Needed)
Just ORDER-BY-PHONE —
PAY-BY-MAIL! Deliveries -
Everywhere - Everyday - "Phonaflower"

*"TO ORDER CALL"*

Exclusive Representative
Your Name
Address . . . . . Phone No. . .

FILED
MAY 16 1963
O'CLOCK
A. WAGNER
PX GX DX
FOR IDENTIFICATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
HON. JAMES B. PARSONS, JUDGE